TOH HUAT KHAY

v.

LIM A CHANG

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZAINUN ALI JCA
HASAN LAH JCA
[CIVIL APPEAL NO: P-02-295-2005]
19 FEBRUARY 2008

LAND LAW: *Transfer - Validity of - Restriction in interest on alienated land - Purported transfer in spite of - Alteration or rescission of condition - Permission - Whether vested in relevant State Authority - Whether transfer unlawful - National Land Code, ss. 109(2), 120, 122, 124*

LAND LAW: *Alienation and incidents - Restriction in interest - Purported transfer in spite of - Alteration or rescission of condition – Permission - Whether vested in relevant State Authority - Whether transfer unlawful - National Land Code, ss. 109(2), 120, 122, 124*

The dispute in this case centred upon a piece of land registered in the name of one Tang Kah Choo. The title to the land carried an indorsement which absolutely prohibited its transfer to any person for a period of ten years and thereafter permitted its transfer only with the consent of the State Authority. The title was issued on 25 September 1996 and according to the terms of the indorsement, it could not be transferred at all until 24 September 2006 and thereafter only with the State Authority's consent. It appeared that in 1996, an application was made by Tang Kah Choo (although the appellant, in his evidence, acknowledged that he was the real applicant) to have the land transferred to the appellant. Despite the express terms of the indorsement, the Director of Lands and Mines ('Director') purported to approve this transfer, and the land was eventually transferred and registered in the appellant's name on 31 March 1998. The respondent (the personal representative of the appellant's brother's estate) brought an action to set aside the transfer. The High Court found for the respondent, resulting in the present appeal. The only issue in this appeal was whether the transfer to the appellant was valid.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) Since the appellant relied on the purported consent given by the Director, everything turned upon whether the Director had acted lawfully in giving his consent. That depended on whether he had acted in accordance with the relevant written law, in this case, the National Land Code ('Code'). Section 109(2) of the Code, which applied to the subject land, provides that such land, upon alienation, becomes subject to such express conditions and restrictions in interest as are then endorsed on the document of title thereto, being conditions and restrictions imposed by the State Authority under the powers conferred by ss. 120 to 122 of the Code. Additionally, s. 124 of the Code confers upon the State Authority the power to alter or rescind any conditions expressed in a title. In the present case, Tang Kah Choo did not apply to the State Authority to rescind the express restriction prohibiting transfer for a period of ten years from the date of the alienation. Instead, she merely applied for permission to transfer the land to the appellant. The Director therefore had no power whatsoever to act as he did since the repository of that power was the relevant State Authority. It followed that the act of the Land Administrator in registering the transfer to the appellant was unlawful, null and void. Consequently, the appellant obtained a title that was defeasible in his hands. Thus, the appellant obtained no title in consequence of the Director acting in breach of the Code. The judge was, hence, correct in making the orders that he did. *M&J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* (foll); *Teh Bee v. Maruthamuthu* (foll). (paras 2, 3, 4, 5 & 6)

Bahasa Malaysia *Translation Of Headnotes*

Pertikaian dalam kes ini berkisar atas sebidang tanah yang didaftar atas nama seorang Tang Kah Choo. Hakmilik tanah tersebut mengandungi indorsemen yang melarang keras pemindahan tanah dalam tempoh sepuluh tahun, dan selepas itu pemindahan hanya boleh dibuat dengan kebenaran Pihakberkuasa Negeri. Hakmilik telah dikeluarkan pada 25 September 1996 dan selaras dengan terma-terma indorsemen, ia langsung tidak boleh dipindahmilik sehingga 24 September 2006 dan selepas itu hanya dengan kebenaran Pihakberkuasa Negeri. Apa yang nampaknya berlaku

ialah, pada tahun 1996, satu permohonan telah dibuat oleh Tang Kah Choo (walaupun perayu, dalam keterangannya, memperakui bahawa beliau adalah pemohonnya yang sebenar) untuk memindahkan tanah kepada perayu. Walaupun terdapat terma-terma ekspres pada indorsemen, Pengarah Tanah dan Galian ('Pengarah') telah meluluskan pemindahan, dan tanah kemudian dipindahmilik kepada perayu dan didaftarkan dengan namanya pada 31 Mac 1998. Reponden (wakil diri pusaka adik perayu) telah memulakan guaman untuk mengenepikan pemindahan. Mahkamah Tinggi memutuskan untuk responden, sekaligus membangkitkan rayuan di sini. Satu-satunya isu dalam rayuan adalah sama ada pemindahan kepada perayu sah.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Oleh kerana perayu bergantung kepada kebenaran yang kelihatannya diberi oleh Pengarah, maka segalanya bergantung kepada sama ada Pengarah telah bertindak secara sah apabila memberikan kebenarannya. Itu pula bergantung kepada sama ada beliau telah bertindak selaras dengan undang-undang bertulis yang relevan, yang dalam kes ini adalah Kanun Tanah Negara ('Kanun'). Sekyen 109(2) Kanun, yang terpakai kepada tanah, memperuntukkan bahawa tanah sedemikian, sebaik diberi milik, adalah tertakluk kepada apa jua syarat nyata dan tegahan-tegahan kepentingan yang tercatat pada surat hakmiliknya, di mana ia adalah syarat-syarat yang dikenakan oleh Pihakberkuasa Negeri di bawah kuasa yang diberikan kepadanya oleh ss. 120 hingga 122 Kanun. Selain itu, s. 124 Kanun memberi kuasa kepada Pihakberkuasa Negeri untuk mengubah atau membatalkan mana-mana syarat yang tercatat pada surat hakmilik. Dalam kes semasa, Tang Kah Choo tidak memohon kepada Pihakberkuasa Negeri untuk membatalkan tegahan nyata yang melarang pemindahan untuk tempoh sepuluh tahun dari tarikh pemberian milik. Beliau sebaliknya hanya memohon kebenaran untuk memindahmilik kepada perayu. Pengarah dengan itu tiada sebarang kuasa untuk bertindak seperti yang dibuatnya kerana kuasa untuk berbuat demikian hanya terletak di tangan Pihakberkuasa Negeri. Ianya mengikut bahawa tindakan Pentadbir Tanah mendaftarkan tanah kepada perayu adalah salah, tak sah dan batal. Perayu telah memperolehi hakmilik yang jelas boleh

A dikalahkan. Dengan kata lain, perayu tidak mendapat sebarang hakmilik ekoran tindakan Pengarah yang melanggar peruntukan Kanun. Dengan itu, hakim betul dalam membuat perintah-perintah yang dibuatnya. *M&J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* (diikuti); *Teh Bee v. Maruthamuthu* B (diikuti).

Case(s) referred to:
M & J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 SC ***(foll)***
Teh Bee v. Maruthamuthu [1977] 2 MLJ 7 ***(foll)***
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Legislation referred to:
National Land Code, ss. 109(2)(a), 120, 124

For the appellant - Dato' Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co
D *For the respondent - Tan Kah Hoo; M/s Gan Teik Chee & Ho*

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-114-1998]

Reported by Suresh Nathan

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JUDGMENT

Gopal Sri Ram JCA:

F **[1]** This is a tolerably plain case. The facts of immediate relevance are straightforward; the applicable law well settled. The parties in the appeal are all related by blood. The dispute between them centres upon a piece of land registered in the name of one Tang Kah Choo. The title to the land in question carries an G indorsement which absolutely prohibits its transfer to any person for a period of ten years and thereafter permits its transfer only with the consent of the State Authority. The title was issued on 25 September 1996. According to the terms of the indorsement, it could not be transferred at all until 24 September 2006 and H thereafter only with the consent of the State Authority. It appears that in 1996, an application was made by Tang Kah Choo (though in his evidence the appellant, who was the defendant in the court below, acknowledged that he was the real applicant) to have the land transferred to the appellant. Despite the express terms of the I indorsement, the Director of Lands and Mines purported to approve this transfer and the land was eventually transferred and

registered in the appellant's name on 31 March 1998. The respondent (the personal representative of the appellant's brother's estate) brought an action to set aside the transfer. The High Court found for the respondent. The appellant appealed to us. He failed. The reasons for our decision are now produced.

[2] The only issue in this appeal is whether the transfer to the appellant is valid. The appellant relies on the purported consent given by the Director of Lands and Mines. So, everything turns upon whether the Director acted lawfully in giving his consent. That depends on whether he acted in accordance with the relevant written law, in this case, the National Land Code 1965 ("the Code").

[3] Now, s. 109(2)(a) of the Code which applies to the subject land provides that such land shall, upon alienation, become subject to:

> such express conditions and restrictions in interest (if any) as are then endorsed on the document of title thereto (or referred to therein), being conditions and restrictions imposed by the State Authority under the powers conferred by sections 120 to 122.

The power to impose conditions is vested in the State Authority by s. 120 of the Code. Additionally, s. 124 of the Code confers upon the State Authority the power to alter or rescind any conditions expressed in a title.

[4] In the present case, Tang Kah Choo did not apply to the State Authority to rescind the express restriction prohibiting transfer for a period of ten years from the date of the alienation. Instead, she merely applied for permission to transfer the land to the appellant. The Director therefore had no power whatsoever to act as he did since the repository of that power was the relevant State Authority. It follows that the act of the Land Administrator in the registering the transfer to the appellant was unlawful, null and void. Consequently, the appellant obtained a title that was defeasible in his hands.

[5] In *M & J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15, Wan Yahaya SCJ quoted with approval the following passage in the judgment of Ajaib Singh J, (as he then was) in *Teh Bee v. Maruthamuthu* [1977] 2 MLJ 7 in relation to the nature of a title obtained in violation of the provisions of the Code:

A I held that in the present case the alienation of the land under qualified title to the respondent did not involve a mere irregularity or non-compliance with the statutory procedure relating to the method of acquiring alienation of qualified title but that the state authority had acted *ultra vires* the National Land Code and therefore the alienation of the land under qualified title was illegal and a nullity. Consequently, the conclusiveness of title and the indefeasibility provisions in the Code were rendered irrelevant and inapplicable.

[6] The position here is *a fortiori*. If the act of the State C Authority in violating the Code gave no title to Teh Bee so too in the present case the appellant obtained no title in consequence of the Director acting in breach of the Code. The judge was therefore correct in making the orders he did. The appeal was accordingly dismissed and those orders made that are usually D consequent upon a dismissal.

[7] My learned sister Zainun bt Ali, JCA and my learned brother Hasan bin Lah, JCA have seen this judgment in draft and have expressed their agreement with it.

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